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**From:**

**Sent:** Friday, May 13, 2011 3:42:58 PM

**To:**

**Cc:**

**Subject:** ACM -- protective returns

We have reviewed your write up, and partially disagree with your conclusion. We believe that the claims for refund (to the extent that they are timely) do qualify as protective claims for refund, thus they should be processed. We provide no opinion on whether the taxpayers are entitled to a refund based on those protective claims.

The taxpayers' claims appear to be that they need to quantify how much they paid in 911 service fees, and then how much of that was subjected to the excise tax, and paid to the Service. The claims have put the Service on notice for the basis of the claim. This is a record keeping exercise on the part of the taxpayers (to the extent that the taxpayers must analyze "thousands and thousands" of records). That said, however, under Mutual Assurance Inc. v. United States, 56 F.3d 1353 (11th Cir 1995), a timely claim may be amended after the expiration of the statute of limitations once the amount is quantified--so long as there is no alternative theory or additional basis for the amended late claim. (The Service nonacquiesced in Mutual Assurance but will follow it in cases appealable to the 11th Circuit). In the Second Circuit, the court of appeals appears to have followed the reasoning in Mutual Assurance. See Wesbart v. United States, 222 F.3d 93 (2d Cir. 2000). According to the Fifth Circuit, "an informal claim is sufficient if it is filed within the statutory period, puts the IRS on notice that the taxpayer believes an erroneous tax has been assessed, and describes the tax and year with sufficient particularity to allow the IRS to undertake an investigation," and the claim has some written component. PALA Inc. v. United States, 234 F.3d 873, 877 (5th Cir. 2000).

We believe that reliance on CCA201046010 could also create a contingency regarding the protective claim, as it establishes that the Service is now not including the 911 service fees in the taxable base of the 4251 excise tax computation.

[REDACTED]

[REDACTED]

I.R.C. section 6511(a) provides that a claim for refund or credit of an overpayment shall be filed within three years from the time the return was filed or two years from the time the tax was paid, whichever was later. In the case of communication excise taxes, the taxpayer generally pays the tax to a collector, who then files the return and remits the tax to the Government. Thus, the three year time period for filing a refund claim begins to run when the collector files the return. See Radioshack Corp. v. United States, 566 F.3d 1358, 1361 (time limits of IRC 6511(a) apply to communication excise taxes); Rev. Rul. 60-58 (same). A refund claim submitted within the time prescribed by IRC 6511 will be considered timely despite a technical defect, if the claim gives notice "fairly advising the Commissioner of the nature of the taxpayer's claim." United States v. Kales, 314 U.S. 186, 194 (1941).

In this case, the refund claim was originally filed on \_\_\_\_\_. This is more than three years after the due date for the return for the first quarter of \_\_\_\_\_ (\_\_\_\_\_). Therefore, the claim for the first quarter of \_\_\_\_\_ is untimely, unless for some reason the return was not filed until \_\_\_\_\_ or later. If that is the case, the timeliness of this claim should be re-evaluated based on the later filing date. Although it seems unlikely, if the tax for this quarter was not paid until \_\_\_\_\_ or later, timeliness would also need to be re-evaluated.

The original claim was signed by the taxpayer's power of attorney. Exam determined that the Form 2848 submitted to show the appointment of the POA was not valid because the taxpayer and the representative had not signed within 45 days of each other. The technical defect in the signature was remedied when a corrected Form 2848 was submitted to the Service on \_\_\_\_\_. While exam concluded that this was too late to save the refund claims for the second and third quarters of \_\_\_\_\_, in our opinion, because the original claim qualifies as a valid informal claim under Kales, then the claim should be considered timely for the second and third quarters of \_\_\_\_\_.